(13)

No. 84-68

In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. CAN INDIAN TRIBES WHICH HAVE REFUSED TO BECOME ORGANIZED UNDER THE INDIAN REORGANIZATION ACT OF 1934 AND WHICH HAVE REFUSED TO ADOPT TRIBAL CONSTITUTIONS UNILATERALLY IMPOSE TAXES ON NON-INDIANS WITHOUT APPROVAL FROM THE SECRETARY OF THE INTERIOR?

II. CAN UNORGANIZED INDIAN TRIBES ASSERT AUTHORITY OVER NON-INDIAN OIL AND GAS LESSEES WHEN THE CONTROLLING ACT OF CONGRESS PERMITS THE EXTENSIVE FEDERAL REGULATION TO BE SUPERSEDED ONLY BY ORGANIZED INDIAN TRIBES, IN ACCORDANCE WITH THE PROVISIONS OF THEIR TRIBAL CONSTITUTIONS?

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*The list of corporate subsidiaries and affiliates of petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, was set forth in the petition for writ of certiorari at page i.

PARTIES BEFORE THE COURT OF APPEALS

The parties before the Court of Appeals for the Ninth Circuit were Tribal Chairman Peterson Zah and the director and members of the Navajo Tax Commission: Delfred Wauneka, Robert Shorty, Jr., Glenn George and William Morgan, Jr.

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OPINIONS BELOW

The opinion and order of the Ninth Circuit Court of Appeals in *Kerr-McGee Corporation v. Navajo Tribe of Indians* are reported at 731 F.2d 597 (Pet. App. A at 1-12) and 731 F.2d 604 (Jt. App. at 84). The opinion of the district court was not reported. (Pet. App. B at 1-23).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1984 (Jt. App. at 85). The petition for a writ of certiorari was filed on July 12, 1984, and was granted on October 9, 1984. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Code, Title 25:

Section 636. Adoption of Constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall be-

come effective when approved by the Secretary. The constitution may be amended from time to time in the manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

2. United States Code, Title 25:

Section 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject

to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

3. United States Code, Title 25:

Section 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Section 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall re-

serve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided,* That the foregoing provisions shall in no manner restrict the rights of tribes organized and incorporated under Sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471, 473, 474, 475, 476 to 478, and 479 or this title.

Section 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

4. Code of Federal Regulations, Title 25:

Section 211.29. Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

STATEMENT OF THE CASE

Petitioner extracts oil and gas from certain lands of the Navajo Indian Reservation in Arizona,[1] set aside by treaty, pursuant to five valid and binding leases issued in 1964 and 1965 by the Navajo Tribe and approved by the Secretary of the Interior. N.M. Docket No. 19. Upon execution of the leases, cash bonuses exceeding $335,000.00 were paid (N.M. Docket No. 19; Exhibits G-K), and petitioner has paid $111,377.00 in rentals and $7,539,490.00 in royalties on these five leases from February, 1967 through March, 1979. Jt. App. at 14; ¶26. In addition, as of April 30, 1979, petitioner had invested more than $6,300,000.00 in capital improvements to these leaseholds. N.M. Docket No. 7; Walker affidavit.

[1]Petitioner, through its wholly-owned subsidiary Quivira Mining Company, also mines uranium from certain lands of the Navajo Indian Reservation in New Mexico set aside by executive order; however, the issue as to validity of tribal taxation of these activities is still pending in the United States District Court for the District of New Mexico. See footnote 3, *post*, and accompanying text.

References to the record in the New Mexico federal district court will be cited as "N.M. Docket No. —"; references to the record in the Arizona federal district court will be cited as "Ariz. Docket No. —".

The Navajo Tribe has never adopted a Constitution despite the fact that Congress has repeatedly invited it to do so. It refused to become organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and it also refused to become organized under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636. To the contrary, it has acquiesced in the continued existence of the Navajo Tribal Council, a body created by the Secretary of the Interior on January 27, 1923, to facilitate the issuance of oil and gas leases.

In 1978, the Navajo Tribal Council adopted a Possessory Interest Tax ("PIT") and a Business Activity Tax ("BAT") because "Navajo revenues from royalties and other traditional sources of income are shrinking." Jt. App. at 38-48 and 48-64. Both of these taxes purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on the reservation. Jt. App. at 46; ¶17, and at 63; ¶26. Neither of these taxes was ever approved by the Secretary of the Interior. Jt. App. at 73; ¶8.

The Business Activity Tax purports to require petitioner: (1) to file declarations of tax due on February

15, May 15, August 15 and November 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%). Jt. App. at 52-64.

The Possessory Interest Tax purports to require petitioner: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (½) due on February 15 and one-half (½) due on August 15 of each calendar year. The tax purports to apply to every leasehold interest on or under the reservation that has a value in excess of $100,000.00 at a rate of not less than one percent (1%) nor greater than ten percent (10%) of the leasehold value. Jt. App. at 41-48.

On May 10, 1979, petitioner filed its complaint in the United States District Court for the District of New Mexico against the Navajo Tribe, the Navajo Tax Commission, the tribal chairman and the director and members of the tribal tax commission, seeking a declaration that the Business Activity Tax and Possessory Interest Tax were void and invalid, as well as an injunction enjoining any enforcement of these taxes. N.M. Docket No. 1. Petitioner alleged that the respondent tribal officials, by seeking to enforce the taxes, were acting beyond the limits of

their lawful tribal authority. Jurisdiction was asserted under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

On September 27, 1979, the Honorable E. L. Mechem dismissed petitioner's claims against the Navajo Tribe and the Navajo Tax Commission on the basis of tribal sovereign immunity.[2] N.M. Docket No. 14. On March 12, 1980, Judge Mechem transferred, over petitioner's objections, petitioner's action insofar as it pertained to petitioner's oil and gas leases in Arizona to the United States District Court for the District of Arizona.[3] N.M. Docket No. 17; Ariz. Docket No. 1.

All activity in the Arizona district court was stayed pending resolution by this Court of the then pending case of *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982). Ariz. Docket No. 14. After the *Merrion* decision was released, the Arizona district court entertained motions for summary judgment that had been filed by both petitioner and respondents. Ariz Docket Nos. 2 and 17. On June 29, 1982, the Honorable William P. Copple rendered his memorandum and order (Pet. App. B at 1-23) which granted summary judgment in favor of petitioner on the basis that the Business Activity Tax and the Possessory Interest Tax were void and invalid because they had not

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[2]Although Justice Blackmun has suggested that the doctrine of tribal sovereign immunity "may well merit re-examination in an approprite case", *Puyallup Tribe, Inc. v. Department of Game of the State of Washington,* 433 U.S. 165, 179 (1977) (concurring), petitioner has not challenged this holding. Instead, it has pursued its claims against tribal officials under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908).

[3]The portion of petitioner's action relating to the New Mexico uranium leases was retained in the United States District Court for the District of New Mexico, which stayed the action on its own motion over petitioner's objections.

been approved by the Secretary of the Interior. The district court rejected all of petitioner's other claims.[4]

The respondents appealed the determination as to Secretarial approval to the Ninth Circuit Court of Appeals. Ariz. Docket Nos. 28 and 38. Petitioner filed a cross-appeal of the district court's rejection of the federal pre-emption, treaty limitations on tribal power and Commerce Clause claims. Ariz. Docket Nos. 30 and 39. The United States filed an *amicus curiae* brief in support of the respondents' position, and urged that Secretarial approval was not required for tax ordinances imposed by Indian tribes that have no Constitutions and that have rejected the self-government provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476 and 477. Oral argument was held in San Francisco on April 15, 1983. Later that day, the three judge panel deferred submission pending decision by the Tenth Circuit Court of Appeals in the *Southland Royalty Co.* case.

On August 22, 1983, the Tenth Circuit reversed the determination by the federal district court in Utah that the respondents' taxes required Secretarial approval. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F. 2d 486 (10th Cir.). That case is still pending, however, be-

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[4]Judge Copple held that *Merrion* required dismissal of the claims in Count I (lack of inherent power) and Count IV (breach of contract). Pet. App. B at 17. He also dismissed the claims in Count II (treaty limitations on tribal tax power), Count III (pre-emption), Counts V, VI and VII (Commerce Clause limitations) and Count VIII (due process and equal protection). Pet. App. B at 18-22. Judge Copple did not reject the equal protection and due process claims on their merits, but rather on the grounds that "the tribe is . . . unconstrained by constitutional provisions" and that "federal courts do not have jurisdiction to hear claims brought under § 1302 of the ICRA." Pet. App. B at 21.

fore the Tenth Circuit Court of Appeals on a petition for rehearing en banc.

The Ninth Circuit rendered its decision on April 17, 1984. The three judge panel—apparently disregarding this Court's holding in *Merrion* that Secretarial approval was necessary "[to] minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies," 455 U.S. at 141 — held that:

> Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

Pet. App. A at 12. In addition, the panel rejected petitioner's pre-emption claim by holding that — notwithstanding the *explicit* distinction between organized and unorganized tribes that Congress drew in 25 U.S.C. § 396b — the purpose of that legislation:

> was not to generate distinctions between tribes organized under the IRA and tribes not so organized. . . .

Pet. App. A at 6.

Petitioner timely filed its petition for writ of certiorari on July 12, 1984; this Court granted the petition on October 9, 1984.

SUMMARY OF ARGUMENT

This Court has repeatedly acknowledged that intercourse between Indian tribes and non-Indians has traditionally been regulated and supervised by the federal government and that "The dependent status of Indian tribes with-

in our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *United States v. Wheeler,* 435 U.S. 313, 326 (1978). Thus, it is no suprise that this Court has held that tribal taxes on non-Indian oil and gas lessees are subject to the constraint of approval by the Secretary of the Interior "[to] minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies", *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982), as well as to comply with "the administrative process established by Congress to monitor such exercises of tribal authority." *Id.* at 155.

The Ninth Circuit, however, held that the Possessory Interest Tax and the Business Activity Tax enacted by the Navajo Tribe do not need Secretarial approval because federal supervision no longer exists over the minority of Indian tribes in this country which, like the Navajo Tribe, have refused to adopt a Constitution under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* This conclusion ignores the very reasons why Secretarial approval is required—reasons that are all the more critical in the case of an Indian tribe whose powers, in addition to not being limited by the Constitution of the United States, are not even limited by a tribal Constitution. Furthermore, the Ninth Circuit's interpretation of the Indian Reorganization Act as a vehicle that limits the exercise of tribal power ignores the purpose, logic and legislative history of the Act, which was intended gradually to reduce federal supervision over those tribes that adopted Constitutions or Charters—not to deceive those tribes into subjecting themselves to even greater federal control and supervision.

The Ninth Circuit also ignored the *explicit* exceptions drawn by Congress in 25 U.S.C. § 396b and by the Secretary of the Interior in 25 C.F.R. § 211.29 to enable those Indian tribes which have adopted Constitutions or Charters under the Indian Reorganization Act of 1934 to supercede the comprehensive regulatory authority that Congress otherwise vested exclusively in the Secretary pursuant to 25 U.S.C. § 396d. Thus, although the federal statutes and regulations require Secretarial approval before oil and gas leases can be either issued or canceled, the Ninth Circuit has held that the Navajo Tribe, by enactment of the Possessory Interest Tax and Business Activity Tax without any federal supervision or approval, may unilaterally cancel oil and gas leases that it unilaterally could not have even issued.

The obvious effect of this decision is to trivialize this Court's decision in *Merrion v. Jicarilla Apache Tribe* and to emasculate the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* The ineluctable result of the decision below is that every Indian tribe that has followed the Congressional policy of the Indian Reorganization Act and has adopted a Constitution will now be encouraged to disorganize, to abandon their Constitutions and to forsake the Indian Reorganization Act so as to circumvent the Congressionally established scheme of extensive federal supervision over Indian/non-Indian relations that dates back to the very beginnings of this Nation.

ARGUMENT

I. Unorganized Indian Tribes Cannot Tax Non-Indians Without Federal Supervision And Approval.

Extensive federal supervision and approval of trade and intercourse between Indian tribes and non-Indians is deeply rooted in the very beginnings of this Nation. Justice Blackmun's recent observation in *Rice v. Rehner*, — U.S. —, 77 L.Ed.2d 961 (1983), that "Since 1790, see Act of July 22, 1790, 1 Stat. 137, the Federal Government has regulated trade with the Indians . . . ", *Id.* at —, 77 L.Ed.2d at 980 (dissenting) can be extended to the period before this Nation had even earned its independence, for this Court had held in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), that Indian tribes in 1773 and 1775 could not, without approval from the sovereign to which they were then dependent, convey their land to non-Indians. *See also Williams v. Lee*, 358 U.S. 217, 220 (1959) ("To assure adequate government of the Indian tribes it [the Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs."). In fact, the lack of federal approval has been used on behalf of the United States and some tribes as a basis for invalidating earlier tribal transactions with non-Indians. *E.g., County of Oneida v. Oneida Indian Nation of New York State*, No. 83-1065; *United States v. Candelaria*, 271 U.S. 432 (1926) (invalidating conveyance); *Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967) (invalidating lease); *United States v. Emmons*, 351 F.2d 603 (9th Cir. 1965) (invalidating lease); *Leaf v. Udall*, 235

F. Supp. 366 (N.D. Cal. 1964) (invalidating contract for legal services).[5]

The present case is an extraordinary departure from that tradition and statutory scheme of federal supervision and control. The five oil and gas leases pursuant to which petitioner extracts oil and gas were, with Secretarial approval, issued under 25 U.S.C. §§ 396a *et seq.* These statutes are part of the extensive statutory scheme by which non-Indian activities on Indian lands have been traditionally regulated by the federal government for nearly 200 years.[6] Without a single citation of authority, however, the Ninth Circuit concluded that federal supervision and

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[5]In fact, in *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.*, 734 F.2d 1402 (10th Cir.), *cert. granted*, — U.S. —, *as reprinted in* 53 U.S.L.W. 3269 (1984), the Tenth Circuit adopted the Indians' argument that specific *Congressional* approval, not just approval by the Secretary of the Interior, was necessary for validity of a right-of-way across tribal lands.

[6]Virtually the entirety of Title 25 is dedicated to supervision by the federal government over Indian affairs, with particular emphasis on dealings between Indians and non-Indians. See, e.g., 25 U.S.C. § 81 (contracts between Indian tribes and non-Indians), §§ 81a and b (contracts between Indian tribes and lawyers for prosecution of claims against United States), § 84 (assignment of contracts), § 85 (contracts regarding tribal funds and property in the hands of the United States), §§ 261 and 262 (regulation of Indian traders), §§ 311, 312, 319, 321 and 323 (rights-of-way), § 320 (acquisition of Indian lands for reservoirs and materials), § 379 (sale of allotted lands), §§ 396a-g and 399 (leasing of Indian lands for mining purposes), § 397 (leasing of Indian lands for oil and gas purposes), § 402a (leasing of Indian lands for farming purposes), §§ 406 and 407 (sale of timber on Indian lands), § 415 (lease of Indian lands for public, religious, educational, recreational, residential, business, and other purposes), and § 452 (contracts with the State for educational, medical attention, relief and social welfare of Indians).

approval is necessary only when an Indian tribe so desires it:

> Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, by-laws or charters.

Pet. App. A at 12. This notion that Indian tribes are free from all but self-imposed regulation was explicitly rejected in *Rice v. Rehner, supra,* where Justice O'Connor explained that:

> Congress did not intend to make tribal members "super-citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations.

— U.S. at —, 77 L.Ed.2d at 979. *See also United States v. Wheeler,* 435 U.S. 313, 326 (1978) ("The dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."). Moreover, in addressing the issue of Secretarial approval, the Ninth Circuit completely ignored this Court's recent decision in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982).

In *Merrion,* this Court specifically held that organized Indian tribes could, *with the approval of the Secretary of the Interior,* impose taxes on non-Indian production of oil and gas from the reservation. Justice Marshall explained that while "neither the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes," 455 U.S. at 148 n.14, an amendment to the tribal Constitution authorizing the tax was "the critical event necessary to *effectuate* the tax." *Id.* (emphasis by the Court). This Court could not possibly have been more explicit in holding that adoption of a Constitution or Charter under Sections 16 or 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476 or § 477 [hereinafter referred to as the "IRA"], as well as Secretarial approval of the tribal tax, were part of "the administrative process established by Congress to monitor such exercises of tribal authority":

> Here, the Congress has affirmatively acted by providing a series of federal checkpoints that *must* be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe *must* obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe *was required again* to obtain approval from the Secretary.

455 U.S. at 155 (emphasis added). Indeed, in distinguishing tribal taxation from federal and state taxation,[7] this Court explained that:

> These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

Justice Marshall's concern that tribal tax powers could be exercised in an unfair or unprincipled manner is entirely consistent with the fact that Indian tribes, unlike every other governmental entity in the United States, are not subject to the constraints on the exercise of govern-

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[7] As Justice Brennan acknowledged in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), "[I]t is now clear that Indian reservations do not partake of the full territorial sovereignty of states or foreign countries." *Id.* at 165 (dissenting).

mental authority set forth in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). Nor are the constraints set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, capable of limiting exercises of tribal civil authority over non-Indians.[8] As this Court held in *Santa Clara Pueblo, supra*, the writ of habeas corpus is the only way in which the Indian Civil Rights Act provisions can be enforced;[9] and as

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[8]In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), the Tenth Circuit held that federal court jurisdiction under the ICRA should not be limited where (1) no other relief or remedy is available, (2) the issues are not related to internal tribal affairs, and (3) the issue concerns a non-Indian. 623 F.2d at 685. *See also National Farmers Union Ins. Co. v. Crow Tribe of Indians*, — U.S. —, *as reprinted in* 53 U.S.L.W. 3167 (September 10, 1984) (opinion of Rehnquist, J., staying mandate of Ninth Circuit Court of Appeals). The district court, however, rejected the reasoning of the *Dry Creek Lodge* decision. Pet. App. B at 22. The Ninth Circuit has also rejected the *Dry Creek Lodge* decision. *E.g., R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3846 (1984); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir. 1981); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).

[9]The writ of habeas corpus is a meaningless remedy to non-Indians since they are not subject to the "criminal" jurisdiction of Indian tribes. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). This is especially true since some tribes are now enacting ordinances that provide for "criminal" punishment of offenses committed by an Indian, but which provide for "civil" punishment (*viz.*, fines or forfeitures) of identical offenses committed by non-Indians. *See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981), *rev'd*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, — U.S. —, *as reprinted in* 52 U.S.L.W. 3720 (1984). According to respondents, this elevation of form over substance is permissible since that is "what the tribe is required to do by the holding of this Court in *Oliphant* . . ." *Respondents' Brief in Opposition to Petition for Writ of Certiorari*, p. 18 n.4.

Justice White observed, the writ of habeas corpus "is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion or just compensation for the taking of property." 436 U.S. at 75 n.3 (dissenting). Federal supervision and approval of tribal taxes or other exercises of tribal "civil" authority over non-Indians provide the only check and balance against exercise of the type of unfair or unprincipled power that the Framers of the Constitution found so objectionable. In fact, federal supervision and approval of tribal affairs is necessary to avoid intolerable tension and conflict between Indians and non-Indians.[10]

Federal supervision and approval of tribal taxes is hardly a recent phenomenon. This is clear from each of the three early cases pre-dating the IRA upon which the *Merrion* Court relied[11] to uphold the validity of the feder-

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[10]This Court may take judicial notice of *Moapa Band of Paiute Indians v. U.S. Department of the Interior*, No. 84-1593 (9th Cir. argued on October 5, 1984), where the Moapa Indian Tribe is complaining about the Secretary's refusal to approve a tribal ordinance authorizing and promoting brothels on the reservation. Of course, under the rule of law announced by the Ninth Circuit in the present case, the Moapa Indian Tribe would not be required to obtain federal approval of its prostitution ventures if it did not want to be subject to such a requirement.

[11]The *Merrion* Court also cited a post-Indian Reorganization Act case, *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), as further support for the validity of the federally approved severance tax of the Jicarilla Apache Tribe. 455 U.S. at 145 n.9. In that case, the Eighth Circuit observed that the tribal tax was "taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C. § 476." 259 F.2d at 556, *quoting from Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d

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ally approved severance tax of the Jicarilla Apache Tribe. 455 U.S. at 141-144. In both *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr.), *aff'd*, 105 Fed. 1003 (8th Cir. 1900), and *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Courts emphasized the important role of federal supervision. In *Maxey*, Judge Clayton had explained that:

> The superintending control of the interior department over the Creeks is nowhere abolished, but on the contrary all recent legislation has confirmed and even enlarged it. . . .

54 S.W. at 810. He then referred, as an example, to the Curtis Act, 20 Stat. 495, which he concluded "from beginning to end recognizes this continued authority of the interior department, and in many cases enlarges it." *Id.* In *Morris v. Hitchcock*, this Court pointed out that the tax enacted by the Chickasaw Tribe had been "sanctioned by the President of the United States on May 15, 1902." 194 U.S. at 393. Justice Edward D. White explained that Presidential review of such tribal tax legislation was "preventive of arbitrary and injudicious action." *Id.* Finally,

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89, 99 (8th Cir. 1956). The earlier *Iron Crow* decision had approvingly affirmed the decision of the district court, which had explained that:

> Pursuant to the provisions of the Indian Reorganization Act, the Ogallala Sioux Tribe adopted on December 14, 1935, a tribal constitution *which was approved by the Secretary of the Interior* on January 15, 1956. Article IV, Sec. 1 (h) of the constitution authorizes the Ogallala Sioux Tribal Council "to levy taxes upon members of the Ogallala Sioux Tribe and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, *subject to review by the Secretary of the Interior*, upon non-members doing business within the reservation."

Iron Crow v. Ogallala Sioux Tribe of the Pine Ridge Reservation, 129 F. Supp. 15, 24 (D.S.D. 1955) (emphasis added).

in *Buster v. Wright*, 135 Fed. 947 (9th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906), Judge Sanborn relied upon this Court's earlier decision in *Morris v. Hitchcock* and pointed out in the very first sentence of the opinion that the challenged permit tax enacted by the Creek Nation had been "approved by the President of the United States in the year 1900. . . ." 135 Fed. at 949. Judge Sanborn later explained that:

> [T]he United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise.

Id. at 954.[12]

In recent years, both before and after *Merrion*, this Court has acknowledged the importance of Secretarial supervision and approval.[13] For example, in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), Justice Brennan emphasized in his dissent that Secretarial approval of the tribal taxing ordinances was so significant as to render the tribal taxes preemptive of the state taxes:

> The conflict with federal law is particularly evident on the present facts because the Secretary of the In-

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[12]In fact, the extent of federal supervision and control in these three early cases is underscored by the fact that the United States, not the Indian tribe, was the only entity which could enforce the tribal taxes. *See Merrion, supra*, 455 U.S. at 183 n.37 (Stevens, J., dissenting).

[13]Critical of the *Merrion* petitioners' disregard for the fact that the Jicarilla Apache Tribe's severance tax had been federally approved, Justice Marshall observed that: "Curiously they [the *Merrion* petitioners] attach virtually no significance to the fact that the Secretary also approved the tax ordinance that they challenge here." 455 U.S. at 150 n.16.

> terior—acting pursuant to lawful regulations—has approved the tribal taxing and regulatory schemes at issue here. That approval, and the federal policies which underlie it, both enhances tribal authority and ousts inconsistent state law.

Id. at 172 (dissenting). In *New Mexico v. Mescalero Apache Tribe,* — U.S. —, 76 L.Ed.2d 611 (1983), a hunting and fishing regulation case, Justice Marshall explained on behalf of a unanimous Court that "Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources." *Id.* at —, 76 L.Ed.2d at 624. After recognizing that the tribal ordinances at issue had been federally approved, *Id.* at —, 76 L.Ed.2d at 615, the Court unanimously acknowledged that:

> [F]ederal law *requires* the Secretary to review each of the Tribe's hunting and fishing ordinances.

Id. at —, 76 L.Ed.2d at 623 (emphasis added). Indeed, in *United States v. Wheeler,* 435 U.S. 313 (1978), a case involving the Navajo Tribe, this Court acknowledged that "Pursuant to federal regulations, the present Tribal Code was approved by the Secretary of the Interior *before becoming effective.*" *Id.* at 327 (emphasis added). More recently, this Court held in *United States v. Mitchell,* — U.S. —, 77 L.Ed.2d 580 (1983), a timber case, that federal control over resources on Indian lands is so extensive that Indians could seek damages from the United States for inadequate supervision. According to Justice Marshall, "Virtually every stage of the process is under federal control." *Id.* at —, 77 L.Ed.2d at 594-595.

Federal supervision and control is also confirmed by the understanding of both the Legislative and Executive Branches. The very Senate Report that this Court in

Merrion cited as congressional acknowledgement of an inherent tribal power to tax also acknowledged that such a power is "subject to the supervisory control of the Federal Government". 455 U.S. at 139-140, *quoting from* S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879). And of course, virtually the entirety of Title 25 of the United States Code attests to the extensive scheme that the Congress, with few exceptions,[14] has enacted for federal supervision and control over Indian affairs.

The understanding of both the Executive Branch and the Congress as to extensive federal supervision and control over Indian affairs is also very clear from the legislative history underlying enactment of the IRA. One of the principal authors of the legislation was Mr. John Collier, the Commissioner of Indian Affairs. 78 Cong. Rec. 11,127 (1934) (Remarks of Senator Shopstead). Upon introduction of the bill, Commissioner Collier stated that "The bill curbs Federal absolutism and provides Indian Home Rule under Federal guidance." *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess. 18 (1934). He further explained that:

> [The bill] deals with a number of matters which are of intense concern to all Indians without exception.
>
> The first of these is Indian self-government or home rule, or participation in Indian business. At

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[14]As discussed below at pages 23-32, the most significant reduction of federal supervision and control has been for those tribes which, unlike the Navajo Tribe, have availed themselves of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* However, even that Act does not provide for total elimination of federal supervision and control.

present, such self-government or participation as the Indians may enjoy is a matter of privilege exclusively. It depends upon the whim of the administration. Fundamentally, under existing law, the Government's Indian Service is a system of absolutism.

The bill seeks to curb this administrative absolutism and *it provides the machinery for a progressive establishment of home rule by tribes or groups of Indians.*

Id. (Emphasis added). Similarly, the Senate Committee on Indian Affairs declared that the legislation was intended:

To stabilize the tribal organization of Indian tribes by vesting them with real, *though limited,* authority, and by prescribing *conditions which must be met by such tribal organizations.*

S.Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934) (emphasis added). These purposes were also articulated by the two sponsors of the legislation, Senator Wheeler and Representative Howard. See 78 Cong. Rec. 11,125 (1934) (Remarks of Senator Wheeler); and 78 Cong. Rec. 11,732 (1934) (Remarks of Representative Howard). In short, this legislative history demonstrates that the IRA was designed to provide the mechanism for tribal governments to assert greater authority over their own affairs with a reduced (but not eliminated) level of supervision from the federal government.[15]

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[15]In expressing his support for the legislation, President Roosevelt emphatically declared in his April 28, 1934 letter to Congressman Howard that "We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government. . . ." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 8 (1934). Obviously, if Indian tribes

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The Navajo Tribe is an excellent paradigm of the pervasive federal control and supervision over Indian affairs. The Navajo Tribal Council was not even created by the Navajo Indians. To the contrary, it was created by the promulgation on January 27, 1923 of "Regulations Relating to the Navajo Tribe of Indians", which stated at section 3 that:

There shall be created a continuing body to be known and recognized as the "Navajo Tribal Council" with which administrative officers of the Government may directly deal in all matters affecting the tribe.

Young, *The Navajo Yearbook, Report No. viii, 1951-1961, A Decade of Progress* 393 (1961).[16] The Council was formed by the Department of the Interior to facilitate the Secretary's supervision and control over development of oil and gas resources on the Reservation. *Id.* at 374-375. This is also confirmed by the November 24, 1936 resolution of the Tribal Council, which acknowledged that the Tribal Council had been established "for the sole purpose

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already had the right to exercise self-government, there would have been no reason for President Roosevelt's impassioned plea that the right of local self-government be extended to Indian tribes "without further delay."

[16]Hereinafter referred to as *The Navajo Yearbook,* this document is an official publication of the Department of the Interior, which reported in 8 volumes on the progress in carrying out the provisions of the Navajo-Hopi Long Range Rehabilitation Act, P.L. 81-474, 64 Stat. 44. This Court has previously relied on *The Navajo Yearbook* as an authoritative source of information about the Navajo Tribe. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685, 691 n.17 (1965); *Williams v. Lee,* 358 U.S. 217, 222 n.8 (1958).

The 1923 rules creating the Navajo Tribal Council, together with all amendments including the 1938 rules, are set forth at pages 393 to 429 of *The Navajo Yearbook.*

of making oil and gas leases." *The Navajo Yearbook* at 378. (The text of this resolution, found in Littel, *Navajo Council Resolut ons 1922-1951,* p. 63, is reproduced as Appendix A at the end of this brief.) In fact, the Commissioner of Indian Affairs acknowledged to the Secretary of the Interior in a March 23, 1937 memorandum that the Navajo Tribal Council "is an institution created by the secretary" and "Its authorities are derived from regulations." *The Navajo Yearbook* at 380.[17] To this day, the Navajo Tribal Council remains a creation of the Department of the Interior; and it operates under the basic framework set forth in the "Rules for the Navajo Tribal Council" that were promulgated by the Secretary of the Interior on July 26, 1938.

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[17]Actually, in contrast to the Jicarilla Apache Tribe, the Navajo Tribe never had any tribal government. When the territory occupied by the Navajos became part of the United States,

> [T]he Navajo Tribe did not exist in the ordinary political sense. There was a group of people sharing a common language and culture, but political organization apparently did not extend beyond local bands led by headmen called *nnat'aanii*. The headmen enjoyed varying amounts of power based on their persuasive ability, but no powers of coercion were attached to the office; the position of headman was not hereditary, and coalitions of headmen were probably few and of short duration. In short, the Tribe did not constitute a political body.
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> * * *
>
> In fact, lack of formal political organization, and especially of responsible tribal leadership, constituted a serious problem for American Military and administrative personnel charged with responsibility for treaty-making, control and program direction.

The Navajo Yearbook at 371. Petitioner respectfully directs the Court's attention to the fascinating discussion at pages 371 to 392 of *The Navajo Yearbook* about how the Department of the Interior created the Navajo Tribal Council out of thin air.

The Navajos can hardly argue that they were unaware of the ramifications of refusing to adopt a Constitution under the IRA. On March 12, 1934, the Commissioner of Indian Affairs, Mr. John Collier, met with the Navajo Tribal Council and explained that if the Navajos did not organize under the IRA, they would remain under the total and complete supervision and control of the Secretary of the Interior:

> The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny every one of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.
>
> ***In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have.*** He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

> *Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner.* There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. *Now what we are seeking in this Title One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs.* And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Fort Defiance, Arizona, March 12 and 13, 1934 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix B at the end of this brief.[18]) At a meeting with tribal representatives one month later, Bureau of Indian Affairs official J.M. Stewart again explained that without the Indian Reorganization Act, the Navajos were subject to the complete control of the federal government:

> HENRY TALLMAN: Mr. Chairman, haven't the Navajo people exercised self-government now, without a charter?
>
> MR. STEWART: No, all your direction, your supervision, is by the Government. Even, for instance, this morning, the government told you you could have thirty policemen. *With self-government, you wouldn't have to ask Washington*, you could put them on.

[18]Three years later, Commissioner Collier confirmed the accuracy of these statements. *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs*, 76th Cong., 1st Sess. 20,956 (1937).

> HENRY TALLMAN: It seems that we have a voice in a lot of matters we have already undertaken, such as the council election. We have a voice in the election of our head men. These have been recognized by the people.
>
> MR. STEWART: You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. *You have no authority under the present set-up.*
>
> HENRY TALLMAN: The reason I asked that, I thought that the way we take things in hand, now, that our voice has been recognized by the states, such as electing officers, and in many cases, don't we pay taxes indirectly on different things?
>
> MR. STEWART: On food stuffs, I imagine, and such things as cigarettes and gasoline, but not real property taxes, land and buildings, and such things.
>
> HENRY TALLMAN: Isn't is possible that the Navajos can get by without a charter?
>
> MR. STEWART: Of course, any Indian tribe can get by without it.
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> HENRY TALLMAN: I mean and still have power.
>
> MR. STEWART: *No, in order to get the benefits, educational and other, there must be a charter granted. Now, that charter may be as told you by Mr. Collier at Fort Defiance. That may be just to give you the ordinary powers to begin with, and gradually work up in a period of years, to a greater control.*

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Crownpoint, New Mexico, April 9-11, 1934 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix C at the end of this brief.)

Although the Navajos wrote to Congressman Howard to express their approval of the legislation,[19] they refused to adopt a Constitution under the IRA. *The Navajo Yearbook* at 377. And sure enough, less than two years later, a delegation of Navajos representing 27,000 Navajo Indians, or a majority of the then 50,000 Navajos, testified in support of two unsuccessful Senate bills which would either repeal the IRA or specifically exempt the Navajos from it. See S. 858, 75th Cong., 1st Sess. (1937); and S. 1736, 75th Cong., 1st Sess. (1937). They also petitioned Congress for "The granting of self-government to the Navajo people by a gradual, orderly, and systematic advance. . . ." *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs,* 76th Cong., 1st Sess. 20,915 (1937). Several years later, Bureau of Indian Affairs Superintendent J.M. Stewart acknowledged that Navajo tribal ordinances could not become effective without federal approval:

> Mr. Stewart: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation, but the legislation is not effective unless appoved by the President, except under certain conditions. ***And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs.***

Minutes of Proceedings of the Meeting of the Navajo Tribal Council, 29-30, held at Window Rock, Arizona, June

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[19]See April 12, 1934 letter from Thomas P. Dodge to the Hon. Edgar Howard, *reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess. 18 (1934).

26-29, 1948 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix D at the end of this brief.)

To be sure, the Ninth Circuit correctly observed that "The purpose of the IRA was to *enable* and encourage Indian self-government." Pet. App. A at 12 (emphasis added). However, it then emasculated this purpose by construing the IRA as a *limitation* on the exercise of self-government by the majority of Indian tribes that have adopted its form of constitutional government.[20] According to the Ninth Circuit, those tribes which rejected the IRA are free of any limitations or constraints on taxing non-Indians,[21] while those tribes that adopted IRA Constitutions must obtain Secretarial approval before taxing non-Indians. Indeed, the Tenth Circuit, whose holdings were adopted by the Ninth Circuit, readily acknowledged that this interpretation "may result in an advantage for tribes which have not adopted a constitution or charter under the IRA." *Southland Royalty Co. v. Navajo Tribe of Indians,* 715 F.2d 486, 489 (10th Cir. 1983), *petition for rehearing pending.*

The purpose, logic and history behind the IRA confirm Justice Stevens' observation in *Merrion* that:

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[20]IRA Constitutions were accepted by 181 tribes and rejected by 77 tribes. Haas, *Ten Years of Tribal Government Under the I.R.A.,* p. 3 (United States Indian Service 1947). The Navajos were the only Indians among the 17 tribes in Arizona to refuse adoption of a Constitution under the IRA. *Id.* at 14.

[21]Obviously, the need for Secretarial approval is more pressing with those tribes which have not adopted any Constitution, since the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner . . .", *Merrion, supra,* 455 U.S. at 141, is most pronounced in those cases.

> To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers *for all Indian tribes that adopted a formal organization under the Act.*

455 U.S. at 173 n.24 (dissenting) (emphasis added). No doubt Commissioner Collier would be astonished to learn that the legislation he championed "[to] provide[] the machinery for a progressive establishment of home rule by tribes or groups of Indians", *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess. 18 (1934), was instead a grand deception by which most Indian tribes in this country had subjected themselves to even greater federal control. No doubt President Roosevelt would be surprised to learn that his impassioned plea in support of the IRA that "We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government". H.R. Rep. No. 1804, 73d Cong., 2d Sess. 8 (1934), was utterly meaningless. In short, the Ninth Circuit's elimination of federal control and supervision over the Navajo Tribe[22] by emasculating the purpose, logic and history of the IRA is simply untenable. *Cf. Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians,* — U.S. —, —, 80 L.Ed. 2d 753, 766 (1984) ("This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive.").

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[22]That Congress has never intended to eliminate federal supervision over the Navajo Tribe is clear from H.R. Con. Res. 108, 67 Stat. B132 (1953), a resolution "Expressing the Sense of Congress that Certain Tribes Should Be Freed From Federal Supervision." In contrast to other tribes specifically identified in the resolution, the Navajo Tribe was not mentioned at all. *See* H.R. Rep. No. 841, 83d Cong., 1st Sess. 3-4 (1953).

II. Unorganized Indian Tribes Cannot Supersede The Extensive Federal Regulation Of Non-Indian Oil And Gas Lessees.

That the United States has complete and plenary power over Indian tribes and Indian affairs is well-established. *E.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). As a result, when the Congress enacts legislation, Indian tribes are not at liberty to circumvent it. This is precisely the teaching of *Kennerly v. District Court,* 400 U.S. 423 (1971) (per curiam), a decision that the Ninth Circuit completely overlooked in reaching its conclusion that 25 U.S.C. §§ 396a *et seq.* and the regulations promulgated thereunder allow unilateral tribal intervention in non-Indian oil and gas production.

In *Kennerly,* the Blackfeet Indian Tribe[23] had enacted an ordinance purporting to allow Montana State Courts to exercise concurrent jurisdiction along with tribal courts over lawsuits against tribal members. The Montana Supreme Court had held that "the transfer of jurisdiction by unilateral tribal action is consistent with the exercise of tribal powers of self-government. 154 Mont. 488, 466 P.2d 85." 400 U.S. at 426. This Court, however, rejected the notion that tribal self-government was sufficient to override an Act of Congress. After noting that Congress, by enactment of Public Law 280, 67 Stat. 589, had already spoken on the subject of jurisdiction, this Court held that:

> The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country . . . .

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[23]The Blackfeet Tribe, unlike the Navajo Tribe, was "duly organized under the Indian Reorganization Act of June 18, 1934. . . ." 440 U.S. at 509.

Id. at 427. Accordingly, this Court invalidated the tribal ordinance. *See also White v. Califano,* 437 F. Supp. 543, 551 (D.S.D. 1977), *aff'd,* 581 F.2d 697 (8th Cir. 1978).

In the present case, enactment of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.,* is the "comprehensive legislation governing the leasing of tribal lands for mining purposes." Cohen, *Handbook of Federal Indian Law,* p.534 (1982 ed.). In fact, 25 U.S.C. § 396d *requires* all such oil and gas operations to be regulated by the Secretary of the Interior, not by Indian tribes:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

The regulations promulgated by the Secretary appear at 25 C.F.R. Part 211, and they are as pervasive and comprehensive as the Indian educational institution regulations in *Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 458 U.S. 832 (1982), and the timber leasing regulations in *United States v. Mitchell,* — U.S. —, 77 L.Ed.2d 580 (1983). They require Secretarial approval of the lease itself (25 C.F.R. § 211.2); they specify the procedure for bidding on oil and gas leases and reserve to the Secretary "the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing. . . ." (25 C.F.R. § 211.3); they require the lessee to file specific information and bonds with the Secretary (25 C.F.R. § 211.6); they permit the BIA superintendent to call for additional information from the lessees (25 C.F.R. § 211.7); except for tribes organized under the IRA, they require rental and other payments due under the leases "which have been or may be approved by the Secretary"

to be paid to the superintendent or other designee of the Secretary for the benefit of the lessors (25 C.F.R. § 211.12); they set the rental and royalty rates at $1.25/acre and 12½% of value, respectively, but permit the Secretary to set higher rates[24] (25 C.F.R. § 211.13(a)); they specify when royalty payments are to be made (25 C.F.R. § 211.16); they specify that in calculating royalties, the Secretary shall make "a reasonable allowance for the cost of manufacture" (*Id.*); they permit the lessor to use gas in excess of the lessee's development and operation needs for tribal buildings (25 C.F.R. § 211.13(b)); they permit representatives from the Interior Department to inspect the leased premises and to inspect the lessee's books and records (25 C.F.R. § 211.18); they require that "the operations must be in accordance with the operating regulations promulgated by the Secretary . . . . " (25 C.F.R. § 211.20); they provide for penalties of cancellation or a $500.00 daily penalty for failure to comply with provisions in either the lease or the regulations (25 C.F.R. § 211.22); they provide specific procedures for determination of violations of the lease or regulations (25 C.F.R. § 211.22); they require the leased lands, upon surrender or cancellation to be delivered to the Government (25 C.F.R. § 211.24); they permit leases to be assigned only with Secretarial approval (25 C.F.R. § 211.26); they provide that the lessor can take possession of the leased premises only after the Secretary, upon conclusion of a hearing, has declared the lease null and void (25 C.F.R. § 211.27); they require that the economic terms of the lease be respected:

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[24]For example, the royalties on petitioner's oil and gas leases are set at 16 2/3% instead of the ordinary 12½%. N.M. Docket No. 19; Exhibits G-K.

"no regulation made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the leases." (25 C.F.R. § 211.28); they require all lease documents to be on "forms prescribed by the Secretary of the Interior" (25 C.F.R. § 211.30); and *most importantly*, they permit only those tribes which have adopted Constitutions under the IRA, the Alaska Act of May 1, 1936, 48 U.S.C. § 362, 258a, or the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. §§ 501-509, to supercede Secretarial supervision and control (25 C.F.R. § 211.29).

Both the Business Activity Tax and the Possessory Interest Tax undermine the Secretary's supervision over oil and gas leases and purport to enable the Navajo Tribe unilaterally to determine how much economic exaction will be required in any given year. In fact, the ordinances permit the Navajo Tax Commission, at its discretion, to determine in any given year whether to apply the BAT at 4% to 8% (Jt. App. at 56; ¶6), and whether to apply the PIT at 1% to 10% (Jt. App. at 43; ¶7). Such unilateral adjustment disrupts the economic supervision and oversight responsibilities vested in the Secretary. See 25 C.F.R. §§ 211.3, 211.7, 211.12, 211.13(a), 211.13(b) and 211.28. In addition, the two taxes purport to enable *unilateral* imposition of fines and penalties by the Navajo Tribe itself. Jt. App. at 62-64; ¶¶24, 25, 26, 27 and 28, and at 45-47; ¶¶12, 13, 14, 17 and 19. Indeed, the taxes would in effect enable the Navajo Tribe unilaterally to cancel the leases under the "penalty" of "permanent loss of all rights to engage in productive activity within the Navajo Nation". Jt. App. at 63; ¶26, and at 46; ¶17. This renders the cancellation provisions in the regulations meaningless. The BAT

also eliminates the "reasonable allowance for the cost of manufacture" covered by 25 C.F.R. § 211.13(a); to the contrary, it permits deductions only for payments made to Navajos or to the Navajo Tribe. Jt. App. at 55-56; ¶5. Finally, the BAT and the PIT purport to enable the Navajo Tax Commission *unilaterally* to exercise "the power to attach and seize assets of a taxable person." Jt. App. at 59; ¶16, and at 46; ¶16. In short, these two tribal taxes purport to enable the Navajo Tribe to oust the Secretary of the Interior from the regulation of oil and gas operations that the Congress required in 25 U.S.C. § 396d.

In *Merrion*, however, this Court acknowledged that there was one significant exception to this Congressional scheme of Secretarial supervision:

> However, the proviso to 25 U.S.C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes* . . . to lease lands for mining purposes . . . *in accordance with the provisions of any constitution and charter adopted by an Indian Tribe pursuant to sections 461, 462, 463,* [*464-475, 476-478*], *and 479 of this title.*"

455 U.S. at 150 (emphasis by the Supreme Court). This Court also recognized that:

> The Secretary has implemented the substance of this provision by the following regulation:
>
> "The regulations in this part may be superceded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, insofar as they are not superceded, shall apply to leases made by organized tribes if the validity of the lease depends up-

> on the approval of the Secretary of the Interior." 25 C.F.R. § 171.29 (1980) [now recodified at 25 C.F.R. § 211.29].

455 U.S. at 150 n. 15. The Navajo Tribe clearly cannot take advantage of these legislative and administrative exceptions because it, unlike the Jicarilla Apache Tribe, has never adopted a Constitution or Charter under the IRA.

The Ninth Circuit, however, simply refused to acknowledge the *explicit* exception that both the Congress and the Secretary made for IRA tribes. It pretended to look to the purpose of the Mineral Leasing Act of 1938, which it concluded "was not to generate distinctions between tribes organized under the IRA and tribes not so organized," but rather was to "bring all mineral leasing matters in harmony with the IRA." Pet. App. A at 6. Nowhere, however, did the Ninth Circuit even attempt to explain how "harmonization" with the IRA could possibly be achieved by permitting *unorganized* tribes to exercise *without* Secretarial approval those powers that Congress permitted only *organized* tribes to exercise *with* Secretarial approval. In this regard, the Court of Appeals apparently disregarded its earlier discussion of the IRA, where it had explained that:

> In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of the Interior, *where before the responsibility for such decisions was lodged in large part only with the Secretary.*

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 (9th Cir. 1981) (emphasis added), *amended*, 665 F.2d 1390 (1982). The Court of Appeals also overlooked the observation it had made only 14 days earlier in *Blackfeet*

Tribe of Indians v. State of Montana, 729 F.2d 1192 (9th Cir.), *cert. granted*, — U.S. —, *as reprinted in* 53 U.S.L.W. 3235 (1984), that by enacting the IRA, "Congress intended to effectuate increased tribal independence and economic power, but did not envision giving up federal responsibility for supervising these [oil and gas] developments and providing necessary services for the Indians. . . ." 729 F.2d at 1198 n. 5. The explicit exception for IRA tribes drawn by Congress itself in 25 U.S.C. § 396b clearly illustrates that Congress specifically intended that IRA tribes were to be given greater authority over oil and gas leases than non-IRA tribes.

Nor do the Ninth Circuit's other arguments justify its disregard for the explicit distinctions between IRA and non-IRA tribes drawn by Congress and the Secretary. The argument that there was no statutory authority at the time 25 U.S.C. §§ 396a *et seq.* was proposed "to lease lands on Indian Reservations created by executive order for mineral development (except oil and gas)", Pet. App. A at 6, is of no significance whatsoever since petitioner's oil and gas leases are on lands of the Navajo Reservation set aside by *treaty* for which statutory authority had previously been enacted in 1891. See 25 U.S.C. § 397.[25] Indeed, the

---

[25]The language "bought and paid for" in 25 U.S.C. § 397 has been interpreted as making the statute applicable to any lands acquired by exchange, not exclusively "through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 164 (1936). *See also* Letter from Acting Secretary Charles West to the Speaker, House of Representatives (June 17, 1937), *reprinted* in H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938).

Ninth Circuit's reasoning overlooks the historical fact that the very reason for creation of the Navajo Tribal Council was to facilitate oil and gas leasing on the Navajo Reservation. See pages 25-36, *ante*. Finally, the Court of Appeals' argument that there is "nothing in the Mineral Leasing Act which inhibits the Tribe's inherent ability to tax as an essential attribute of sovereignty", Pet. App. A at 7, is defective because it assumes that the Navajo Tribe has an inherent right to be free of federal supervision. This was certainly not the case in *Kennerly v. District Court, supra,* where even an IRA tribe discovered that it did not have the power unilaterally to specify how jurisdiction could be exercised on its Reservation. Nor was this the case in *Merrion, supra,* where Justice Marshall explained that while an Indian tribe may have an inherent power to tax, the *exercise* of that power must fulfill "the administrative process established by Congress to monitor such exercises of tribal authority." 455 U.S. at 155.

The application of the Business Activity Tax and the Possessory Interest Tax by unilateral action of the Navajo Tribe unlawfully circumvents the regulatory authority that the Congress specifically vested in the Secretary of the Interior. 25 U.S.C. § 396d. Moreover, the exercise of *unilateral* tribal authority to tax, to impose fines and penalties and to cancel oil and gas leases will only serve in the long run to depress the value of oil, gas, mineral or other development on Indian lands, and thus, to depress the long-term revenues that Congress wished to maximize. *See Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072, 1075 (9th Cir.), *cert. denied,* — U.S. —, *as reprinted in* 52 U.S.L.W. 3461 (1983) (holding that unilateral tribal power to cancel commercial leases "could reduce the return to tribes from long-term commercial leases.").

CONCLUSION

Indian tribes are domestic dependent Nations which the Congress has placed for nearly 200 years under the control and supervision of the Secretary of the Interior. Thus, it was error for the Ninth Circuit to hold that the Navajo Tribe could unilaterally, without approval from the Secretary of the Interior, apply taxes against non-Indian oil and gas lessees with whom it could not even have contracted in the absence of Secretarial approval. It was also error for the Ninth Circuit to conclude that the Navajos' failure to adopt a Constitution under the IRA eliminated federal supervision and control, since the purpose of the IRA was to reduce federal supervision and control for those tribes that adopted Constitutions, not for those tribes that refused to do so.

The comprehensive statutory and regulatory scheme enacted by the Congress and implemented by the Secretary of the Interior for oil and gas leasing on Indian lands does not permit unilateral tribal intervention in those activities. Even the one exception for tribes that have adopted Constitutions under the IRA still requires Secretarial review and approval for tribal taxes against non-Indian lessees. It was error for the Ninth Circuit to conclude that there was never any intention "to generate distinctions between tribes organized under the IRA and tribes not so organized" (Pet. App. A at 13) when the distinction was explicitly expressed by both Congress and the Secretary in 25 U.S.C. § 396b and 25 C.F.R. § 211.29.

In conclusion, the Ninth Circuit has eliminated federal supervision and control precisely where it is most urgently needed. It has trivialized this Court's decision

in *Merrion v. Jicarilla Apache Tribe* by limiting its application to those tribes that adopted Constitutions or Charters under the IRA. Such a conclusion also trivializes the IRA, which was intended by Congress to reduce the level of federal supervision and control over those tribes which adopted Constitutions or Charters, not to eliminate federal supervision and control over those tribes which refused to adopt Constitutions or Charters. The Ninth Circuit's decision cannot be allowed to stand; it must be reversed, the Business Activity Tax and Possessory Interest Tax should be held void and invalid, and this Court should reaffirm the continuing supervision and control over Indian affairs that the Congress has required for nearly 200 years.

November 20, 1984

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APPENDIX TO BRIEF FOR PETITIONER

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APPENDIX A

NAVAJO TRIBAL RESOLUTION, DATED NOVEMBER 24, 1936

WHEREAS, the Navajo Tribal Council was organized in 1923 under regulations adopted by the Government for the sole purpose of making oil and gas leases in behalf of the tribe;

WHEREAS, the authority of the Tribal Council under existing regulations to deal with tribal problems other than oil and gas leases is inadequate;

WHEREAS, there is a vital need for the Tribal Council to speak and act with authority for the tribe on all problems affecting the Navajo people;

WHEREAS, it is deemed that now is the proper time to organize a new Tribal Council that will represent the entire tribe and its needs;

THEREFORE, BE IT RESOLVED by the Navajo Tribal Council in council assembled that a new Tribal Council be organized as soon as practicable;

BE IT FURTHER RESOLVED that a committee consisting of the present members of the executive committee and the former chairmen of the Tribal Council be, and the same is hereby appointed for the purpose of calling a constitutional assembly for the purpose of considering and adopting a constitution or by-laws for the Navajo people.

APPENDIX B

(p. a) MINUTES OF THE SPECIAL SESSION OF

THE

NAVAJO TRIBAL COUNCIL

held at

Fort Defiance, Arizona

March 12 and 13, 1934

The Navajo Tribal Council was convened in special session at Fort Defiance, Arizona, on Monday, March 12, 1934, with the following officials, delegates and alternates present:

Honorable John Collier, Commissioner of Indian Affairs.
Wm. Zimmerman, Assistant Commissioner.
Mr. Thomas Dodge, Chairman of the Council.
J. M. Stewart, Chief of the Land Division.
A. C. Monahan, Assistant to the Commissioner (Property).
Wm. H. Zeh, Acting Director of Forestry.
Robert Marshall, Director of Forestry.
Felix Cohen, Assistant to Solicitor, Interior Department.
Ward Shepard, Land Division, Washington, D.C.
W. V. Woehlke, Personal Representative of the Commissioner.
J. D. Lamont, Co-Ordinator, E.C.W.
Hugh Calkins, Regional Director, Soil Erosion Service.

Louis C. Mueller, Chief Special Officer.
H. C. Neuffer, Supervising Engineer.
Mark Radcliffe, Field Agent.
Oliver LaFarge, President National Association of Indian Affairs.
Dr. C. J. Whitfield, Director of Research.
R. V. Boyle, Erosion Service.
Dewey Rierdon, Assistant District Road Supervisor.
A. H. Womack, Irrigation Foreman at Large.
Supt. Henry Roe Cloud, Superintendent Haskell Institute.
Charles Collier, Erosion Service.
R. M. Tisinger, State Supervisor of Indian Education, Arizona.
H. F. Patterson, Asst. State Supervisor of Indian Education, Arizona.
Miss Dorothy Ellis, Assistant Supervisor of Home Economics.
(p. b) John G. Hunter, Superintendent, Southern Navajo Agency.
S. F. Stacher, Superintendent, Eastern Navajo Agency.
E. R. McCray, Superintendent, Northern Navajo Agency.
J. E. Balmer, Superintendent, Western Navajo Agency.
E. H. Hammond, Superintendent, Hopi Indian Agency.
Theodore Hall, Superintendent, Leupp Indian Agency.
C. E. Faris, Superintendent U. S. Indian School, Santa Fe, New Mexico.
Guy Hobgood, Superintendent, Truxton Canyon Indian Agency.
D. E. Harbison, Forest Supervisor, Fort Defiance, Arizona.
A. G. Hutton, Extension Agent, Fort Defiance, Arizona.
Chee Dodge, Ex-Chairman of the Council.
Deschna Clahcheschillige, Ex-Chairman of the Council.

Avena M. Wade, Stenographer, Fort Defiance, Arizona.

DELEGATES	ALTERNATES
Northern Navajo Jurisdiction, Shiprock, New Mexico.	
J. C. Morgan	Boyd Peshlakai
Robert Martin	Bob Bekis
Allen Neshki	Sam Manuelito
Eastern Navajo Jurisdiction, Crown Point, New Mexico.	
Becenti Bega	John Perry
Southern Navajo Jurisdiction, Fort Defiance, Arizona.	
Henry Taliman	Jim Shirley
Albert Sandoval	Toadechenia Cheschillie
Frank Cadman	Denet Tso
Black Mustache	Leo Parker
Western Navajo Jurisdiction, Tuba City, Arizona.	
Lee Bradley	Scott Preston
Geo. Bancroft	Billy Sawyer
Hopi Jurisdiction, Keams Canyon, Arizona.	
Fred Nelson	Billy Pete
Leupp Jurisdiction, Leupp, Arizona.	
Marcus Kanuho	Nal Nishi

Interpreters: Howard Gorman and Alfred Bowman.

(p. 1) CHAIRMAN:

The meeting will come to order. We will have the roll call.

(All delegates and alternates responded except Henry Taliman, Albert Sandoval and Marcus Kanuho.)

Members of the Council: The purpose of this meeting is several-fold. We all have heard of the new policy that is being set afoot by the new administration as far as the Indians are concerned and this new policy is embodied in what is termed the Wheeler-Howard Bill. The Commissioner is here to explain this bill to us and after

he has explained it to us then we will discuss it. Mr. Collier:

MR. COLLIER:

Friends, of the Council, and others here: As your Chairman has stated, there are a number of subjects to be dealt with at this meeting of the Tribal Council. There are important matters that just have to do with the Navajo Tribe, and then there is an important matter that is being laid before all the Indians, the Wheeler-Howard Bill. Your chairman has decided that the meeting will first deal with this Wheeler-Howard Bill, the bill that concerns all of the Indians.

I shall try to tell you about this bill, not giving too many details and not using up too much time. You all know the importance of the Constitution of the United States, which is the fundamental law of the life of the United States. This bill, which is being laid before the Indians, will be as important to them as the Constitution of the United States is to all of the people of this country. We believe that all of the Indians, when they understand the bill, will not only endorse it but will want it and will work and fight for it. It is our belief that even a thing as good as this is, as we believe it is, should not simply be put through Congress because we think it is good, but only because the Indians want it. And for that reason we have called great meetings of the Indians, or congresses, in many parts of the country, and I am going there, and the Assistant Commissioner and other members of the Indian Bureau Staff, are going to these meetings in Oklahoma and the northwest, the Dakotas and California, and all over.

The Navajo tribe is the largest of all the tribes with the largest area of land owned by any tribe and the bill will have an important bearing on the welfare of the Navajos, and therefore, we are laying it before you, as before the other Indians.

(p. 2) I want you first to understand that the bill represents the policy not only of the Indian Office, but of the Interior Department and of the Secretary of the Interior, Mr. Ickes, and in addition, the policy of the President, Mr. Roosevelt.

• • •

(p. 6) The final part of this bill which concerns you is the part dealing with what we call self-government. That is Title One of the bill. It is the only part of the bill that requires a detailed explanation so far as you are concerned.

I had hoped to finish this explanation before twelve o'clock. It may be I cannot finish it but I will go ahead until twelve.

But before coming down to the details of this Title One, let me talk with you about the condition at present. The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny every one of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could

abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

(p. 7) In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

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APPENDIX C

MINUTES OF THE SPECIAL SESSION
of the
NAVAJO TRIBAL COUNCIL
held at
Crownpoint, New Mexico
April 9 to 11, 1934

The Navajo Tribal Council was convened in special session at Crownpoint, New Mexico, on Monday, April 9, 1934, with the following officials, delegates and alternates present:

Mr. Thomas Dodge, Chairman of the Council
J. M. Stewart, Chief of the Land Division, Indian Office
S. M. Dodd, Chief Finance Officer, Indian Office
Hugh Calkins, Regional Director, Soil Erosion Service
Louis C. Mueller, Chief Special Officer
Mark Radcliffe, Field Agent
Dr. C. J. Whitfield, Director of Research
R. V. Boyle, Erosion Service
John G. Hunter, Superintendent, Southern Navajo Agency
S. F. Stacher, Superintendent, Eastern Navajo Agency
E. R. McCray, Superintendent, Northern Navajo Agency
J. E. Balmer, Superintendent, Western Navajo Agency
E. H. Hammond, Superintendent, Hopi Indian Agency
Theodore Hall, Superintendent, Leupp Indian Agency
Chee Dodge, Ex-Chairman of the Council
Deshna Clahcheschillige, Ex-Chairman of the Council
Aven M. Wade, Stenographer, Fort Defiance, Arizona
Charles H. Smith, Stenographer, Crownpoint, N. Mexico.

DELEGATES	ALTERNATES
Northern Navajo Jurisdiction, Shiprock, New Mexico.	
J. C. Morgan	Boyd Peshlakai
Robert Martin	Bob Bekis
Allen Neshki	Sam Manuelito
Eastern Navajo Jurisdiction, Crownpoint, New Mexico.	
Becenti Begay	Alfred Perry
(p. 2) DELEGATES	ALTERNATES
Southern Navajo Jurisdiction, Fort Defiance, Arizona.	
Henry Tallman	Jim Shirley
Albert Sandoval	Toadechenia Cheschillie
Frank Cadman	Denet Tso
Black Mustache	Leo Parker
Western Navajo Jurisdiction, Tuba City, Arizona.	
Lee Bradley	Scott Preston
Geo. Bancroft	Billy Sawyer
Hopi Jurisdiction, Keams Canyon, Arizona.	
Fred Nelson	Billy Pete
Leupp Jurisdiction, Leupp, Arizona.	
Marcus Kanuho	Nal Nishi

Interpreters: Alfred Bowman, John Foley, Howard Gorman and Julian Sandoval.

MR. DODGE:

The meeting will come to order. Before we proceed with business, I will call on Mr. Stacher to say a few words to us.

MR. STACHER (Interpreted by Alfred Bowman):

Friends, it is a pleasure to greet you here today. We feel highly honored that the Tribal Council selected this place for this meeting, and while we are limited for facilities to take care of this council, we are going to do the

best we can as our facilities will admit. We hope that your stay will be pleasant and profitable and that you will come again. We know that there are many subjects to be taken up, and we hope that you will give your very best attention and decisions in matters that will affect the Tribe, as this means a lot for the future. We hope to be able to take care of all the visitors and feed them over here. We are having a barbecue dinner which will be free to all, or we can feed you over at the Club. We will charge 50¢ for dinner and supper and 35¢ for breakfast. We want to furnish lodging to every one we can, and if you have not been assigned a bed, please see some of the committee at the office. (p. 3) Again we want to thank you for coming, and we hope that you will find your stay pleasant.

MR. DODGE:

The interpreters are Alfred Bowman, John Foley, Howard Gorman, and Julian Sandoval. The interpreters for today are: Alfred Bowman and John Foley. Before we proceed, we will have roll call. (Alfred Bowman proceeded to call roll)

MR. DODGE (Afred Bowman, Interpreter):

The quorum is present for business. You all know that at the last Council meeting at Ft. Defiance, final action on the Wheeler-Howard Bill was deferred until this meeting. Hence, the main business of this meeting is to discuss and consider, and take final action on the Wheeler-Howard Bill, and in order that the provisions of the bill may be fully understood by the Council, I believe it will be a wise policy to have the bill read and translated—interpreted word for word. I think only in that way we can discover

any defects that may be in the Bill, if any. My intention was that I was going to read the Bill and interpret at the same time. However, Dr. Richards tells me that I should not use my eyes too much, so I will have to leave that responsibility to Mr. Stewart, who is here with us. So now I will call on Mr. Stewart to present any communications that he may have from Washington.

MR. STEWART (Interpreted by John Foley):

Mr. Chairman, Delegates, Alternates, assembled Indians, and white friends, it seems that I am in the Indian country more than I am in Washington, and I can assure you it is a pleasure to be out here more than I am in Washington.

At the Ft. Defiance meeting, resolution was passed relative to giving the Navajo Tribe a mounted police force. Also, at that meeting, although it was not discussed, the Indians and the white people assembled there were awaiting word as to the location of the Central Navajo Agency. On both matters I have a personal written message from Commissioner Collier to the Navajo Council and the Navajo Indians. I will read this message and then hand it to the interpreter to read it for you.

April 5, 1934.

TO THE NAVAJO TRIBAL COUNCIL AND THE NAVAJOS:

Mr. Stewart will bring you this message. If it were possible I should accompany him but the situation in Washington forbids me to leave.

(p. 4) We are putting all our strength behind the Navajo Boundary Bills as well as the Wheeler-Howard Bill. We have very good hopes for both of these

measures. The attitude of the Navajos in the matter of stock reduction and range control has proved to be of very great help, in pleading the case of the Boundary Bills. Indeed, I think it is going to be decisive, and that it will be the means of actually passing the Boundary Bills.

Mr. Stewart likewise will bring you the news that the mounted police for the reservation can, as we hoped, be paid for out of government funds. We are depending on the Council and the Chapters to take a great responsibility for making the work of these mounted police a complete success.

I am anxious for the Council to understand that in going to the Budget and Congress for a gratuity appropriation of nearly a million dollars for Navajo land purchase, we are making it harder to obtain favorable action on the Wheeler-Howard Bill, with its grant of money for land purchases for all the other tribes. For this among other reasons, I am hopeful that the Council will give a strong expression, in behalf of the Navajo tribe, urging Congress to enact the Wheeler-Howard Bill, which all the Indians need as greatly as the Navajos need the Boundary Bills. Of course, the Navajos likewise need the Wheeler-Howard Bill.

The final decision about locating the Navajo center was reached by Secretary Ickes today after Mr. Zimmerman and I had presented him our views and the views of the Joint Committee which made its survey some weeks ago. We hope and believe that the tribe as a whole is going to be pleased with the place of location and we know they are going to be pleased with the structures to be built at the Window Rock site. • • • • • • •

I will interrupt myself here to say that there is no reason for reading the last three lines which relate to the name selected for the site, because it has been changed to "Nee Alneeng", which means "Center of the world" or

Navajo center of the world". The rest of this letter reads as follows:

All the people at the Washington Office join in sending you their hearty wishes.

JOHN COLLIER
Commissioner.

• • •

(p. 27) HENRY TALLMAN:

Mr. Chairman, haven't the Navajo people exercised self-government now, without a charter?

MR. STEWART:

No, all your direction, your supervision, is by the Government. Even, for instance, this morning, the government told you you could have thirty policemen. With self-government, you wouldn't have to ask Washington, you could put them on.

HENRY TALLMAN:

It seems that we have a voice in a lot of matters we have already undertaken such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

MR. STEWART:

You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau

in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. You have no authority under the present set-up.

HENRY TALLMAN:

The reason I asked that, I thought that the way we take things in hand, now, that our voice has been recognized by the states, such as electing officers, and in many cases, don't we pay taxes indirectly on different things?

MR. STEWART:

On food stuffs, I imagine, and such things as cigarettes and gasoline, but not real property taxes, land and buildings, and such things.

HENRY TALLMAN:

Isn't it possible that the Navajos can get by without a charter?

MR. STEWART:

Of course, any Indian tribe can get by without it.

HENRY TALLMAN:

I mean and still have power.

MR. STEWART:

No, in order to get the benefits, educational and other, there must be a charter granted. Now, that charter may be as told you by Mr. Collier at Fort (p. 28) Defiance. That may be just to give you the ordinary powers to begin with, and gradually work up in a period of years, to a greater control.

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APPENDIX D

(p. 1) PROCEEDINGS OF THE MEETING OF THE NAVAJO TRIBAL COUNCIL

Window Rock, Arizona
June 26, 28 & 29, 1948

ROLL CALL

District	Name	Precinct	Attendance
1	Charley Young	Kleche	Present
1	Amos Singer	Kaibeto	Present
1	Yellow Lefthand	Coppermine	Absent
1	Tohonie Nez	Tomalea	Absent
2	Joe Fuller	Navajo Mountain	Present
2	Paul Begay	Inscription House	Present
2	H. T. Donald	Shonto	Present
3	Maxwell Yazzie	Tuba City	Present
3	Frank Goldtooth	Coal Mine Mesa	Present
3	Gilbert Yazzie	Bodaway House	Absent
4	Hosteen-Tse-Dah	Pinon	Absent
4	White Hair Begay	Forest Lake	Present
4	Oscar Yonne	Dennebito	Present
5	Paul Smith	Leupp	Absent
5	Tse Keskzzie Begay	Red Lake	Present
5	Hosteen Soni	Bird Springs	Absent
5	Roger Davis	Indian Wells	Present
7	Kenneth Williams	Jeddito	Present
7	Arthur Lee	Dilkon	Absent
7	Joe Nelson	Cedar Springs	Absent
8	Descheene	Chil chin Bito	Present
8	Frank Bradley	Kayenta	Absent
8	Nocki Begay	Dennehetso	Present
8	John Lee Simpson	Monument Valley (Oljato)	Absent
9	David Clah	Teec Nos Pos	Absent
9	Atsity Bitsui	Mexican Water	Present
9	Etsitty Betah White	Sweetwater	Present
9	Clark Gable	Rock Point	Present
10	George Hubbard	Nazlini	Present
10	Samuel W. Gorman	Salina	Present

		Rough Rock (Many Farms)	
10	Selth Begay		Present
10	Reed Wenny	Chinle	Absent
11	Howard W. Sorrell	Lukachukai	Present
11	Hosteen-Tsosie-Badani	Wheatfields	Present
11	Sam James	Round Rock	Present
12	Joe Duncan	Shiprock	Present
12	Vernon Washburn	Sanastee	Absent
12	Eddie Nakai	Aneth	Absent
12	Lee Tom	Red Rock	Present
12	Louis Bigman	Nava	Present
13	Don Gleason	Burnhams	Absent
(p. 2)			
13	Yellowman	Lower Fruitland	Present
13	Carl Johnson	Upper Fruitland	Absent
14	Dewey Etsitty	Mexican Springs	Present
14	Nelson Damon	Coyote Canyon	Present
14	Dan Keanie	Naschitti	Present
14	James Becenti	Tohatchi	Present
15	Herbert Becenti	Crownpoint	Present
15	Billy Becenti	Lake Valley	Present
15	Manuelito Begay	Bloomfields (Borrego Pass)	Present
15	Fred Tsosie	Pueblo Pintado	Absent
15	Heronimo Castillo	Terreon	Present
16	Etcitty Ya Begay	Manuelito	Present
16	Charlie H.	Cheechilgethe (Two Wells)	Absent
16	Shorty Begay	Mariano Lake	Present
17	Naswood Begay	Cornfields	Absent
17	Willie Davis	Kinlichee	Absent
17	Billie Pete	Greasewood	Present
17	Howard Gorman	Ganado	Present
17	Tom Lincoln	Steamboat	Present
17	Harold Clark	Klagetoh	Present
18	Blind Billie	Sawmill	Present
18	Clyde Lizer	Fort Defiance	Present
18	Carl Mute	St. Michaels	Present
18	Aubrey Francisco	Crystal	Present
18	Jim Hale	Oak Springs	Present
18	Hosteen Nez Kimball	Houck	Absent
19	Lilly J. Neil	Carsons	Present
19	Fred Yazzie	Lybrooks-Nageezi	Present
Ramah	Davis Skeet	Ramah	Absent
Puertocito	Olson Apachito	Puertocito	Absent
Canoncito	Lorencito Platero	Canoncito	Absent

INTERPRETERS

Paul Jones, Albert G. Sandoval, Sr., and Alfred Bowman

The meeting was called to order June 26, 1948, by Sam Ahkeah, Chairman, Paul Jones interpreting. Forty-five delegates answered the roll call.

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(p. 21) MORNING SESSION

Monday, June 28, 1948

The meeting was called to order at 1:20 P. M., Sam Ahkeah, Chairman, presiding, Albert G. Sandoval, Sr., interpreting.

CHAIRMAN: We have a quorum, 41 having answered roll call, so the Council meeting is now in order. I would like to say that if the members of the Council would maybe put on their best thinking cap we might go through with the different subjects before them now and maybe we will get through by some time tonight so we can go home as we all have pretty much to do at home.

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(p. 28) JOE DUNCAN, District 12: I am in full agreement with one of the speakers regarding the power the Council has. Heretofore we have been more or less forced to adopt different things for the people. After the Council approves it they turn around and say the council has no power, do not have the authority. That has been done heretofore. We hear from various points over the country that the Navajo Tribal Council has no power and we are being ridiculed by the public. They tell us what is the use going to Window Rock? You have no power. You are not recognized. Now whenever anyone, any of the government officials, are assigned to a position he is

given a certain amount of responsibility or power to be in that position, but with the Tribal Council that has never been shown. There are over 70 members of the Tribal Council and those 70 members have never been told they have any authority at all.

Now it has been stated by Mr. Davis that we are acquiring some kind of power step by step, but it appears to me that is not so. We may take several steps and after we have taken those steps we are told we have no power. Now suppose we should go and tell our people we have adopted this fund for acquiring some milk goats for the people. Then the people would want to know when is that coming and we may tell them some time in the future, in the fall, and after that has been done the Secretary will say we have no grazing permits to have those goats on the reservation, then what are we going to do about it. Now this subject was brought before us about three days ago, about getting goats for some of these people and we (p. 29) have not been told whether these goats have to have grazing permits. We have here Mr. Stewart, our superintendent, and Mr. Littell, our Tribal attorney. What we would like to know is when and if we are ever going to have any power, the Council. Mr. Littell has never said anything about that to us and we are paying Mr. Littell to be our attorney. Now we have hired Mr. Littell to be our legal advisor. What we would like to know is just where or whether or if there is any chance of the Council having any powers, or when, or is it that he is just going to come here time after time and sit before us and go back and say the Tribal Council has no power. These people sitting here as members of the Council have been discussing that among ourselves outside.

Why should we go into the Council House having no power, no authority? That is the reason for bringing this up now. So what we are anxious to know first is whether or not there is any chance of having power or if the officials will come out in the open with it and tell us just how far we can go with these things. And so I think it is foolish for the Council to be discussing anything like this without first knowing just how far they can go with it, how much authority they have, I want to know if you have anything on the book or any regulation to that effect?

MR. STEWART: We have too many books, I am sure of that.

JAMES BECENTI, District 14: There were two questions. Mr. Littell was questioned and also the Superintendent.

MR. STEWART: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation but the legislation is not effective unless approved by the President, except under certain conditions. And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs. The situation is somewhat comparable to the Congress and the President, except for this condition. Congress does have the law and machinery whereby it can overcome or veto or a disapproval by the President. Now, it isn't quite true for you to believe that you do not have any power. You have the power of public assembly here, which is power number one. You have the power of making recommenda-

tions and passing resolutions which are in effect tribal laws or ordinances. You have those powers, at least, recent actions of the Department on your resolutions strongly indicate that you do not have the power of final action. My personal belief has been and still is, and I have urged the Tribal Council down through the years, to formulate a set of regulations of its own, call it a Constitution or a charter or anything you want to, whereby certain powers can be delegated to the Council from the Secretary of the Interior. Now there are certain powers that can be delegated to the Council by the Secretary of the Interior without an Act of Congress. There are other powers that must be delegated by an Act of Congress.

Now, to me, this resolution which has been read to you, is the first concrete attempt to open the door whereby the Navajo Tribal Council is conferred authority, and by that conference of authority it in turn confers (p. 30) authority upon the Advisory Committee. It is the first real step forward that I have seen. It certainly is not a waste of time here, today or Saturday, because through the adoption of this resolution and its acceptance by the Commissioner or the Secretary — and we have to go back to Washington again — but through the adoption of this resolution and the putting of this plan into operation thereafter, it will demonstrate to the Navajo people and to the Commissioner and to Congress whether or not the Navajo Tribal Council and Advisory Committee are proper people to be given authority to run a great many things concerning their affairs. This will be a trial document in many respects. Now I am personally so convinced that once this is put into effect that the actions of the Advisory Committee will show such profound thinking

and carefulness in the operation of this credit program, not only the small one proposed in this document, but the larger one we will get later on, that there will be no trouble at all in getting a delegation of larger authority from time to time to the Navajo Tribal Council. I have told this Council, not particularly you gentlemen but previous Councils, that as far as I can see all you have is a regulation that allows you to organize, period. Right there we stop. And that there should be a committee set up whereby developments could be made in terms of conferring authority on the Tribal Council by the Secretary of the Interior of those things he can delegate, and that that committee also consider rules for the conduct of the Tribal Council and report back to the Tribal Council of those determinations.

Now to answer Joe very directly. My personal feeling and understanding is that the Navajo Tribal Council does not have the authority to demand. It has only the authority to request. I think Roger pretty well put the situation. Let's get ready for the time when we can obtain greater authority on these larger topics.

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